FILE COPY.

OFFICE RECEIVED JAN 28 1903

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 62.

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
THE CITY OF MOBILE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

FREDERICK G. BROMBERG,
EUGENE H. LEWIS,
Of Counsel for Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 62.

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
THE CITY OF MOBILE,
Defendant in Error.

Petition for Rehearing of Plaintiff in Error.

TO THE HONORABLE MELVILLE FULLER, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiff in error respectfully applies for a rehearing in the above entitled cause, and for causes shows:

1.

That the Court in its opinion says, pages 8 and 9: "Had this patent been issued before the admission of Alabama into the Union, it would be difficult to see why it did not convey a perfect title."

It was decided by the Supreme Court of Alabama, in *Hallett vs. Hunt* (7 Ala., page 882), following this Court and noticing the different classes of claims enforced by the Act of March 3, 1819, that "a grant may be made by a law as well as by a patent pursuant to a law; and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*."

The exact language of the Court is as follows:

"The fourteenth section of the act of 1804, 'erecting Louisiana "into two territories, and providing for the temporary govern-

" ment thereof,' enacts, that all grants for lands with in the territories " ceded to the United States by the French Republic, by the Treaty " of Paris, in 1803, made after the Treaty of St. Ildefonso, shall " be deemed null, void and of no effect, from the beginning; except " in certain cases, &c. (1 Land Laws, 114, Ed. 1838.). Surely it " was competent for Congress to disregard this enactment, and " give to the Treaty a different exposition as to all grants which " were valid by the Spanish laws, or else exempt from its applica- " tion certain claims, by acknowledging that they are 'valid and " complete titles,' against the United States, or persons claiming " under them. This much the Act of 1819 has done *in totidem* " *verbis*, and its legitimate effect as it respects the grant to Forbes & " Co., is a declaration that the land conveyed by it, vested in the " grantees a title superior to any the United States had, or could " confer."

" It is further objected to the title of the plaintiff below, that it " will not sustain an action at law, because no patent was ob- " tained from the United States by the original grantees, or their " legal assignees, for the lands they claim. The recognition of its " validity by the Act of 1819, we have seen, was an admission that " it was complete in itself, and that the Federal Government had " no interest to convey. In *Strother v. Lucas* (12 Peters' Rep. 454), " it was held, that a grant may be made by law, as well as by a " patent pursuant to a law; and a confirmation by a law is as " fully, to all intents and purposes, a grant, as if it contained in " terms a grant *de novo*. And in *Grignon's Lessee v. Eckhart*, (2 " How. Rep. U. S. 344), it was decided, that an equitable became a " legal title, by its confirmation, by an Act of Congress, which " was equivalent to a patent. 'It was a higher evidence of title, as " it was the direct grant of the fee which had been in the United " States, by the Government itself, whereas the patent was only " the act of the ministerial officers.' See also, *United States v.* " *Arredondo*, and others (6 Peters' Rep. 723–4); Land Laws, (Part " II, Ed. 1838, Nos. 864, 1017)".

" It is not necessary to enable the assignees of Forbes & Co. to, " maintain an action, to show that the lands embraced by their " grant were actually located, and the limits defined by a surveyor " acting under the authority of the United States. The Act of 1819 " makes an unqualified acknowledgment of the validity and com- " pleteness of their title, without requiring any act to be done. The " eleventh section, which is the only one pertinent to the present

" point of inquiry, makes it the duty of the principal deputy sur-
" veyor for the lands south of the State of Tennessee, to survey, or
" cause to be surveyed, the lands, the claims to which are con-
" firmed, and that are directed to be granted as donations, where
" the same have not been already surveyed."

Pages 899 and 900,

2.

Petitioner further shows that the claim of Bernoudy is founded upon written evidence of title, the fact of such writing being established as a lost grant by oral evidence deemed sufficient by the Commissioner to whom Bernoudy's claim was presented. It comes under the provisions of section 2 of the Act of March 3, 1819; (3 Stat. at Large, page 528); and is confirmed in the same manner as if the title had been completed. The grant referred to in 7 Ala., above cited, is No. 21, July 8, 1802, of Commissioner Crawford's report, (3 State Papers, 398); the same report under which Munora claimed in right of Bernoudy.

3.

Petitioner further shows that Alabama did not adopt a State Constitution, or pass an ordinance accepting the proposition of Congress, made March 2, 1819, until August 2, 1819, four months after the confirmatory Act.

Code of Alabama of 1876, p. 68.

The State was not admitted into the Union until December 14, 1819.

3 Stat. at Large, page 608.

It is respectfully submitted that August 2, 1819, is the date from which the rights of the State vest, and not March 2, 1819.

The latter Act was entirely provisional. It vested no rights in the people of the territory of Alabama. The 9th section of the Act expressly provides that the constitution to be formed under the Act shall be transmitted to Congress for approbation. If the legal title to the soil under the navigable

waters of the territory of Alabama vested in the people of the territory of Alabama as an inchoate State, upon the adoption of the enabling act, then if Congress had not approved the Constitution so adopted by the people of the territory, we would have had the result that the legal title to the soil under the navigable waters of the United States vested in the people of a territory, and Congress divested of all control and regulation over it. That such would have been the consequence seems to the petitioner to clearly show that there could have been no vesting of the legal title on March 2, 1819, in the people of the territory of Alabama, or any estate suspending the rights of claimants under Spanish grants.

The rights of Bernoudy arose under acts which preceded by many years the Act of March 2, 1819, viz. the Act of April 25, 1812, (2 Stat. at Large, page 713).

This is shown by the field notes of the Bernoudy grant, shown on page 22 of the transcript of the record in this case, wherein it is recited as follows: "Pursuant to an order from the principal deputy "surveyor of the land district of the island of New Orleans, and "in conformity with certificate No____ from the commissioner ap- "pointed under the authority of the Act of Congress, *April 25*, "*1812*, and recognized by a subsequent Act approved March 3, "1819, I have surveyed a tract of land claimed by Regis Bernoudy, "on Mobile River, in the State of Alabama, etc."

These field notes and the report of the Commissioner, cited in the opinion of this Court, are proof of the cultivation and inhabitation by Bernoudy of this tract, and also that this tract was fully identified and its corners established and surveyed, which is only a *consequence* of identification, and not the cause of the identification. The *locus in quo* of "inhabitation and cultivation" must have been proved to the satisfaction of the Commissioner, and that the survey followed the proof is the presumption; otherwise, how could the Surveyor General have known how to establish the corners of the grant? Clearly, only from the evidence before the Commissioner, which established the fact, and the *locus in quo* as well as the inhabitation and cultivation.

It is well settled that papers referred to in patents and deeds become part thereof by reference, as much as if written into them, and the acts of 1812 and 1819 were referred to by the patent and field notes, part of the evidence offered by the petitioner in the court below.

4.

It is well settled by this Court that a grant of titles to lands once made by the legislature is irrevocable.

Tenet v. Taylor, (9 Cranch, 43, cited by STORY, J., in *Wilkinson v. Leland*, 2 Pet. 657).

It is there said by this Court: "A grant or a title to lands once "made by the legislature is irrevocable, and cannot be reassumed "by any subsequent legislative act; and that a different doctrine "is utterly inconsistent with the great and fundamental principle "of a republican government and with the right of the citizens to "the free enjoyment of their property lawfully acquired."

It is respectfully submitted that the rights of Munora under the Bernoudy grant commenced with the Act of April 25, 1812, under which he went before the Commissioner of the United States for the purpose or establishing his claim. It is also respectfully submitted that there is no passage in the Act of March 2, 1819, enabling Alabama to enter into the Union, which in any way suspended the rights under Spanish grants, which had been acquired under previous statutes of the United States, or nullified them.

It is further submitted that, if the doctrine of relation is to be applied in this case, the commencement of the title of Munora of the Bernoudy grant, under United States Statutes, relates back to April 25, 1812, more than seven years prior to the enabling act under which Alabama was finally admitted into the Union.

It is therefore respectfully submitted that the title of the petitioner is as perfect as if the patent had issued before the admission of Alabama into the Union.

Respectfully submitted,

FREDERICK G. BROMBERG,

EUGENE H. LEWIS,

Counsel for Petitioner.

We, the undersigned, members of the bar of this Honorable Court, certify that we have examined the foregoing petition and that, in our opinion, it is well founded and is not made for the purpose of delay.

Dated, January 20th, 1903.

FREDERICK G. BROMBERG,

EUGENE H. LEWIS,

Counsel for Petitioner.

02
No. 599. Orig.
Brf. of Smith for D. C. (on mo.)
Filed April 8th 1901.
No. 599

Office Supreme Court U. S.
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.

In Supreme Court of the United States.

THE MOBILE TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY OF MOBILE, A MUNICIPAL CORPORATION,

DEFENDANT IN ERROR.

BRIEF OF HARRY T. SMITH UPON THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE APPEAL UNDER RULE NUMBER SIX OF THE UNITED STATES' SUPREME COURT PRACTICE.

COMMERCIAL PTG. CO., MOBILE, ALA.

No.....

In Supreme Court of the United States.

THE MOBILE TRANSPORTATION COMPANY,
PLAINTIFF IN ERROR,

VS.

THE CITY OF MOBILE, A MUNICIPAL CORPORATION,
DEFENDANT IN ERROR.

BRIEF OF HARRY T. SMITH UPON THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE APPEAL UNDER RULE NUMBER SIX OF THE UNITED STATES' SUPREME COURT PRACTICE.

The action was ejectment by the defendant in error (plaintiff below) against the plaintiff in error (defendant below) to recover a portion of the shore and bed of the Mobile River between high-water mark and the channel line or point of practical navigability, situate in the city of Mobile, Alabama.

The defendant in error, who was the plaintiff in the trial court, and the appellee in the Supreme Court of Alabama, claimed, and the trial court and the Supreme Court of Alabama held, that the shore and bed of the Mobile River, which is a navigable stream in which the tide ebbs and flows, passed out of the United States Government and into the State of Alabama by virtue of the compact under which Alabama was admitted into the Union in 1819, and that this title passed from the State of Alabama to the City of Mobile by virtue of two acts of the legislature, which were in words and figures as follows:

"An Act Granting the City of Mobile the Riparian Rights in the River Front.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the shore and the soil under Mobile River, situated within the boundary lines of the City of Mobile, as defined and set forth in section two of 'An act to incorporate the City of Mobile,' approved February 2d, 1866 be and the same is hereby granted and delivered to the City of Mobile.

"Sec. 2. Be it further enacted, That the mayor, aldermen and common council of the City of Mobile be and are hereby created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

"Approved, January 31, 1867."

"An Act to amend an Act entitled 'An Act to fix the right of the City of Mobile to certain real estate.' Approved February 18th, 1895.

"Sec. 1. Be it enacted by the General Assembly of Alabama, That an Act entitled 'An Act to fix the right of the City of Mobile to certain real estate,' approved February 18th, 1895, be, and the same is hereby amended so as to read as follows:

"Sec. 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining, or incidental, to any real estate, of any right therein, or thereto, heretofore vested in the mayor, aldermen and common council of the City of Mobile or in the Port of Mobile, or in the present City of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the City of Mobile, is hereby vested absolutely, and unconditionally in the City of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

"Sec. 2. Be it further enacted, That the said City of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part of the whole, of such property and the rights hereby vested in it and may if it thinks proper to do so, convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters.

"Approved, December 5th, 1896."

The plaintiff in error, who was the defendant below, asserted three propositions, each of which were denied by the Supreme Court of Alabama, and these, as we understand, constitute the only rulings which are here sought to be reviewed. They are as follows:

1. The plaintiff in error claimed to have acquired title to the land in question from the patentees of the United States Government under a patent issued in 1836; but the Supreme Court of Alabama held that the title of the United States Government having passed to the State of Alabama in 1819, the United States Government had no longer a title which it could convey to the grantors of the plaintiff in error.

2. The plaintiff in error claimed to have obtained the right of possession to the shore and the soil under the Mobile River to the point of actual navigability, by virtue of what it was pleased to call, its riparian rights as an abutting owner. But the Supreme Court of Alabama held, (1) that the plaintiff in error had no title to the adjoining land, and was not an abutting owner; (2) that a conveyance bounding the land by a tidal stream, conveys only to high-water mark, even when the grantor owns below.

It is, we think, true also, that the grant to the patentee in 1836, having been bounded by meets and bounds, and not by the river, would not have passed any riparian rights, even had the title thereto remained in the United States Government, but this point has not been passed upon by the Supreme Court of Alabama.

3. The plaintiff in error insists that the grant of the State of Alabama to the City of Mobile is violative of the constitution of the United States, upon the ground that it is an interference with the navigation, which, it is said, is per force an interference with interstate commerce. The Supreme Court of Alabama held, (1) that a conveyance by a trustee, even in violation of his trust, passes a legal title and will support an action of ejectment; (2) that the possession by the city to the line of

practical navagability, in trust for the public use (as the grant provided), would facilitate rather than hinder commerce; (3) that the constitution of the United States does not prevent the conveyance of the legal title from passing to any person or prevent the wharfing or proper use of any shore, and that the authority of the United States to interfere in this question arises only when there is an actual or threatened impediment to commerce.

There are other questions which are raised in this case but which bear no semblance, whatever, to federal questions and which it is therefore deemed unnecessary to discuss. For instance, it was asserted by the plaintiff in error and denied by the Supreme Court of Alabama, that the plaintiff in error was estopped in an action of ejectment by reason of having collected taxes upon the property sued for. Again it was insisted by the plaintiff in error and denied by the Supreme Court of Alabama that the grant from the state to the city was void because the act did not conform to the Constitution of the State, in that its title was not broad enough to cover all of the provisions of the act; and again it was contended by the plaintiff in error and denied by the Supreme Court of Alabama that the state statute of limitations were applicable to the case. These, however, being questions exclusively for the courts of the state, will not at this time be noticed further than to say that the ruling of the Supreme Court can be supported by an abundant citation of authority whenever the necessity arises.

The writer of this brief, regarding it as the duty of every counsel to be frank in the presentation of his cause, desires to say that the question as to whether the State of Alabama obtained a title to the shore and the soil under the Mobile River, by virtue of the compact under which Alabama became a part of the Union, oppears to him to be a federal question, but one which has been so frequently decided and as to which the law is so thoroughly established in this court, that it must now be classed as frivolous, unless it can be otherwise to per-

sist in requiring this court to reiterate doctrines which have already been established by a long and uniform line of its decisions, and that it appears to the writer, that to bring a case before this court only to have this doctrine reiterated, evidences a desire and purpose simply to obtain delay. (4) As to whether or not the question as to the effect of a patent from the United States Government in the year 1836, by which the government undertook to convey away lands to which it had no title, having already parted therewith in 1819, also presents a federal question, the writer entertains very serious doubts. This question, like that above mentioned, however, is one which has been so frequently considered by this court, always with the same conclusion, that it seems to us to be now properly classed amongst the frivolous, even if, indeed, the fact that it presents only the inquiry whether something can come out of nothing, would not have compelled this classification, had there been no decisions upon the subject.

We shall attempt, in a later portion of this brief, to justify these observations by the citation of authority upon each of these questions.

The third constitutional question attempted to be presented by the plaintiff in error, namely, that of interference with commerce, is, we think, in no manner involved in the case.

The defendant asserts and shall seek to establish the following propositions, almost any one of which should, we believe, suffice to dispose of the present writ of error:

First. That the title to the shore and bed of the Mobile River passed to the State of Alabama at the time that Alabama became a member of the Union, in 1819, and if so, the holding of the Supreme Court of Alabama that this title was passed from the State to the defendant in error, is conclusive of the case.

Second. That the patent issued by the United States in 1836 would, therefore, have been inoperative even had it de-

scribed the land in question, for the reason that the United States had no title to convey.

Third. That this patent did not describe the lands in question, because the grant was bounded, not by the river, but by meets and bounds.

Fourth. That even had the description bound the land by the river, the question as to whether this grant should be construed as extending to the low-water or to high-water mark is a question for the State, and not the federal courts.

Fifth. That the high-water mark has been universally held to be the boundary of the adjoining owner upon tidal streams and that there is no authority to the contrary, except where the question is governed by local statutes.

Sixth. That this is because the title, being in the state and not in the federal government, the adjoining owner takes, under such a patent, if anything, a mere revocable license, and this, not from the federal government, but from the state in which the title is vested, and it is, therefore, for the state alone to determine whether such a license is granted or not.

Seventh. That even in those states where such a license is granted by implication from the state, it is revocable at any time before it is executed.

Eighth. That in Alabama no such license is implied under our constitutional provision, and if it had been, would have been revoked by the grant of the title to the city in 1867.

Ninth. That upon all of these questions, except the first, the decision of the state court is final and not reversable, and that upon the question first named the law is settled beyond the bounds of controversy.

Tenth. That the federal control over interstate commerce is in no manner involved in this case.

Eleventh. That the other questions in this case cannot be considered by this court.

In discussing these questions, however, it is important to observe that the property sued for, is partly below, and partly

above, low-water mark, the former being the soil under the river between low-water mark and the channel of the river, as established by law, and the latter being the land between low-water mark and high-water mark, or what is known as the shore.

That the property sued for is thus divided into two portions, is of importance, because there are several decisions in Alabama which appear to hold that a grantee of the United States Government, of lands bounded by a navigable river not subject to the ebb and flow of the tide, conveys the title to *low-water mark*, but not beyond. We hope to be able to demonstrate, as the Supreme Court of Alabama has in this case considered, that these authorities have no application to lands where the tide ebbs and flows; nor to cases where the grant from the government is made subsequent to the admission of the state into the Union, nor where the state or its grantee is contesting this right. It is, nevertheless, of great importance to observe that whatever may be the law in regard this matter, according to the decisions upon which the appellant itself relies for the establishment of the rule which it asserts, its title would be expressly limited to low-water mark, and would not extend to that portion of the property sued for, which lies between low-water mark and the channel of the river, and there being a portion of the land sued for below low-water mark, which the appellee was entitled to recover even under the appellant's own contention, there could be no error in the charge directing the jury to find for the plaintiff.

It is also important in entering upon an examination of this question, to observe that no question arises in this case as to accretions, or alluvia, since the property sued for lies between the present high-water mark and the channel of the river, and does not include any portion of the property back of that which may formerly have been covered by water, but which, by gradual accretions, has now become dry land. We do not discuss the question as to accretions, or as to the title

to the land which lies above the present high-water mark, but which was covered by water at the time of the admission of this State into the Union and at the time of the conveyance by the state to the city, because this question is in no wise presented by this record, and we respectfully suggest that any expressions upon this subject would be a dictum, given without a proper opportunity for argument, or occasion for investigation, and which might embarass a proper decision of this question when it arises, as it will do hereafter, in other litigations which are now pending and in which these accretions are involved.

First, second, fourth, fifth, sixth, seventh and ninth.

The propositions which we have announced under subdivisions first, second, fourth, fifth, sixth, seventh and ninth have been so frequently treated together in the dicisions, that we shall not now undertake to separate them, although they seem to us to be entirely distinct. Did, therefore, the title to the bed and shore of the Mobile river, which is in fact navigable, and in which the tide ebbs and flows, pass to the State of Alabama by virtue of the compact under which the State became a member of the union? If so, could the United States Government thereafter convey the same to a third person? If the patentee of the United States in a patent issued after the land had passed to the State, took anything, was it a title or a license? If a license, was it revocable? And upon this question can the court review, or is it bound by the decisions of the State courts?

That the shores and beds of all navigable streams within the limits of the State, became the property of the State by virtue of the act of its admission into the union, ought no longer to be questioned.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.
Hallett and Walker vs. Beebe, 13 Howard, 25.
Hoboken vs. Pa. R. R. Co., 124 U. S., 688.
Shively vs. Bowlby, 152 U. S., 55.
Water Power Co. vs. Water Comrs., 168 U. S. 357.

Indeed it is both interesting and important, if not entirely conclusive of this case, to note that prior to the issuance of the patent upon which the appellant relies, the Congress of the United States undertook by the act of May 26th, 1824, to convey these lands directly to the City of Mobile and that the City of Mobile brought suit for the recovery thereof against those who were then in possession, and that the city was defeated in these suits upon the simple ground that the United States Government had parted with the title to these lands in the year 1819, by virtue of the compact under which the State of Alabama was admitted into the union, and that the title was therefore in the State and could not then be conveyed by the United States Government. The validity of the act of Congress in other respects was in no manner questioned; the power of the government to convey such lands when it possessed the title thereto was not doubted; but both the Supreme Court of Alabama and the Supreme Court of the United States explicitly decided that the city could not obtain a title from the United States Government in 1824 to land which the government had conveyed to the State in 1819, and yet it is contended that the United States Government could and did convey the title to these lands to those under whom the appellant claims, *in the year 1846*. It was because the United States Government had undertaken to convey these lands to the City of Mobile, and because it had been held by the Supreme Court of Alabama in the City of Mobile against Eslava, 9th Porter, 578, and by the Supreme Court of the United States in Pollard vs. Hagan, 3rd Howard, 212; in the City of Mobile vs. Eslava, 16th Peters, 240, and in Goodtitle against Kibbe, 9th Howard, 471, that the title to these lands was vested in the State of Alabama, and in order to carry out the purpose of the act of Congress of May 26th, 1824, that the Legislature of the State of Alabama passed the act of January 31st, 1867, Acts of Alabama 1866-7, p. 307.

It would certainly now be a most curious result should the City of Mobile be held not to be entitled to these lands by

reason of the denial of the very fact the existence of which was, in these cases held to defeat the grant from the United States Government to the City of Mobile.

The decision which is now sought to be reviewed, adhering to the established doctrine in Alabama, as indeed of all the courts where the question has been considered unaffected by a statute, has held that the patent of the United States describing the grant as bounded by a tidal stream, would pass title only to the high-water mark, both because such would be the proper construction of the grant, and because the Federal Government owned no title beyond this point, to convey. Before examining into the decisions on this point, however, we beg to cite the following cases as establishing the proposition that the State decisions upon this point are conclusive upon this court.

Barney vs. Keokuk, 94 U. S., 324.
St. Louis vs. Rutz, 138 U. S., 250.
Water Power Co., vs. Water Comrs., 168 U. S., 357.
Shively vs. Bowlby, 152 U. S., 1.
I. C. R. R. vs. Illinios, 146 N. S., 517.

We have made our investigation exhaustive, and state at the beginning of this argument, that although the questions about to be presented have been repeatedly considered both in England and in almost every State in this union, we have found no case where a grant by the government to an individual, of lands bounded by a *navigable stream where the tide ebbs and flows*, has ever been held to carry the shore below the high-water mark; nor does there exist (we believe) a case where the space between high and low-water mark even upon a navigable stream *above* the ebb and flow of the tide, was ever held to pass to a patentee of the United States Government under a patent issued subsequent to the admission of the State in which the lands were situate, while as in the case at bar, the State or its assignees was asserting title thereto.

The question first came before the Supreme Court of Ala-

bama, in the case of Mobile vs. Eslava, 9 Porter, 577, where it was held that the title to this land passed from the United States to the State of Alabama in 1819, by virtue of the compact under which Alabama became a member of the Union, and that a subsequent patent from the United States passed no title whatever. This case was cited with approval, and affirmed in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and the doctrine there asserted was reaffirmed by our Supreme Court in the later case of Kennedy vs. Bebee, 8 Ala., 909, and in Pollard vs Greit, 8 Ala., 941.

The case of Mobile vs. Eslava, was appealed to the Supreme Court of the United States, and was by that court affirmed.

This Alabama doctrine has also been thoroughly established by the Supreme Court of the United States.

Pollard vs. Hagan 3 How., 212.
Goodtitle vs. Kibbe, 9 How., 471.
Hoboken vs. Pa. R. R, Co., 124 U. S., 656.
Shiveley vs. Bowlby, 152 U. S., 55.
Water Power Co. vs. Water Comrs., 168 U. S., 357.
Hallett & Walker vs. Bebbe, 13 How., 25.
And other authorities that will be mentioned hereafter.

In Weber vs. Harbor Comrs., 18 Wal., 64, it seems that one who obtained title from the Government which itself had parted with title to shore, did not become entitled to any riparian rights whatever.

In each of these cases, constituting four distinct decisions of the Supreme Court of Alabama, as well as several decisions of the Supreme Court of the United States, the question as to the title of the patentee of the United States government under the patent issued subsequent to the admission of the State into the Union, for the lands between high water mark and low water mark, was distinctly presented. It was the only question in the cases. It was elaborately considered, and unquestionably decided, that neither the United States government, nor a private individual, can grant a title, which it does not possess.

Not only is this court bound by the decision of the Supreme Court of Alabama, and not only has the Supreme Court of Alabama frequently decided these questions, but those decisions were right, as we shall attempt to demonstrate. It is said that this doctrine, so firmly settled upon the early judicial history of our State, and which has been again reiterated in the decision of the case at bar, is opposed to the case of Webb vs. Demopolis, 95 Ala., 116.

An examination of the cases will show that from the beginning of our government, it has been the universally settled doctrine of the State of Alabama, and of the Supreme Court of the United States, that the title to the land lying *below high water mark, upon navigable streams, where tide ebbs and flows,* is vested in the State of Alabama, and that the patent of the United States government, issued *subsequent to the admission of the State into the Union*, conveys no title, whatever, to these lands, and if they correctly expound the law, they leave us only to inquire as to whether the State could and did convey these lands to the city of Mobile. Both of these questions have been decided by the Supreme court of Alabama with affirmation and upon these questions the decision of that court is final unless it results in an interference with interstate commerce which it is not possible to conjecture.

It would do but little credit to the eminent jurists, who concurred in this opinion, to suppose that it was their intention to overrule several former decisions of their own bench, which had been cited with approval not only by the Supreme Court of Alabama, but repeatedly by the Supreme Court of the United States, and which reasserted the same doctrine at intervals of ten years apart, and this, without even a citation or mention of these cases, or the slightest consideration of the doctrine therein established or the citation of a single case which conflicted with them; it would be indeed unfortunate for the inhabitants of the state of Alabama, if the rules of property which had stood unquestioned for several generations

were to be changed without a discussion, or a mention of the former decisions of the Supreme Court of Alabama by which they had been so repeatedly asserted. These considerations assure us of the conclusions which we have reached, to the effect that these cases do not in the slightest conflict.

It is decided in the case of Webb vs. Demopolis, 95 Ala., 129, that "whether the grant made by the United States to George S. Gains for the Demopolis Town Company, and which enured to its benefit, of the land upon which the city of Demopolis now stands extended to ordinary high water mark, or to the line of the low water, or to the middle thread of the Tombigbee River, depends therefore upon the rule of property in this respect which Alabama has adopted. *The rule which this state has adopted* and declared through this court is, that a grant by the United States to land bordering *on a navigable river* includes the shore or bank of SUCH RIVER, and extends to water line thereof at low water." (The emphasizing by capitals and italics in this and the following quotations are our own.)

How then are we to reconcile this language with the cases already cited where it was repeatedly asserted "that a grant by the United States to lands bordering on a navigable *stream where the tide ebbs and flows extends only to high-water mark?*"

The cases are plainly distinguishable upon other grounds to be mentioned hereafter, but the distinction which is made most prominent by the universality of its adoption and that drawn by the cases themselves, is to be found in the fact that in Webb vs. Demopolis the court was considering the rights of a riparian owner upon a *navigable river where the tide does not ebb and flow*, while in the cases cited by the appellant and in the case at bar, the lands in question constitutes the shore and the bed of the *tide waters* of the state.

To him who is just beginning the consideration of this subject, it may appear at a glance that there is no good reason for such a distinction, but it is not so.

The common law of England, so far as it is applicable to

our institutions and remains unchanged by our statutes. is the law of Alabama, and from the policy of this law no state in the union has, in this matter, ever departed so as to extend the rights of a riparian owner. Owing to the fact that in England the rivers above the ebb and flow of the tide are, as a rule, small and unimportant, the title of the riparian owners thereon, was extended to the middle of the stream, while the right of the riparian owner, upon waters where the tide ebbs and flows, was restricted to the high water mark. The rule has never been otherwise in England, and no court either in England or in America has ever extended the common law right of a riparian owner. Some of the states, Alabama amongst them (see Webb vs. Demopolis and cases these cited), have *restricted* the right of a riparian owner upon streams which were in fact *navigable, although above the ebb and flow of the tide.* Some of these states have restricted them to the low water mark; others to the high water mark, while others adhere to the old common law distinction and permit them to hold to the middle of the stream. The difference in the rule which prevails in the several states in this particular, rests entirely upon the difference between them as to what shall constitute the test of navigability. The test most consonant with good sense is that, of course, which has been adopted in Alabama, where it is a question, a fact to be determined by the practicable test of whether the stream is actually navigable; many of the states hold to the distinction of the common law. Those states that adopt the Alabama rule hold that the same reason which restricts the riparian owner to high water mark where the tide ebbs and flows, alike operates where the stream is actually navigable, though above the influence of the tide, and therefore restrict him, in some states, to high water mark and in other states to low water mark. The modification of the common law, however, in every case has been a restriction and not an extension of the riparian ownership. Where the common law has not been strictly adhered to it has been—in every case—because the reason

which restricted him in England where the tide ebbed and flowed, alike restricted him in America where the *river* was actually navigable.

This, an investigation of the cases will demonstrate, is the rationale of the rule and this is the distinction which existed between the case of the city of Mobile vs. Eslava, and that of Webb vs. Demopolis. In other words the latter case only decides, that in Alabama, the Demopolis Co. was *restricted* to low water mark although at common law its title would have extended to the centre of the stream; and this because the reason of the rule which restricted the riparian owner where the tide ebbed and flowed also in a degree at least, restricted him when the river was in fact navigable, though the tide did not ebb and flow. While in Mobile vs. Eslava the riparian owner, being upon a stream where the tide ebbs and flows, owned at common law only to high water mark and was therefore confined to that limit.

Owing to the importance of the cause, we shall ask the court to follow us through a somewhat extended inspection of the cases, as bearing upon the contention just stated.

The Federal Court will not construe a grant bounded by a navigable stream as conferring any title below the high water mark, although the state may allow riparian rights below this.

Packer vs. Bird, 137 U. S., 669.

In Shively vs. Bowlby, 152 U. S., 43, it is said:

"By the common law as before remarked, such additions to the land on navigable waters belong to the Crown, but, as *the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide;* that reason being that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tidé waters, found in the monuments of common law, long prevailed in this country, notwithstanding the broad difference existing between the extent and topography, of the British island and that of the American continent. It

had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines, with regard to the ownership of the spill in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as above remarked, is for the several states themselves to determine."

That the modification of the common law has been a *restriction and not an extension* of the right of the riparian owner is clearly stated in

Packer vs. Bird, 137 U. S., 666,

where it is said,

"The question presented is, whether the patent of the United States describing the eastern boundary of the land as commencing at a point on the river, which was on the right and west bank, and running southerly on its margin, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption.

"It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high water mark. The title to land below that mark in such cases is vested in England in the Crown, and in this country in the state within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the streams. No rivers there, at least none of considerable extent, are navigable in fact, which are not

subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide water, and by vessels larger than any which sailed on the seas when the common law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of The Daniel Ball, 10 Wall., 557, 563: 'They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.'

"The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common law doctrine on this subject, prevailing in England, is held in some of the states, but in a large number has been considered as inapplicable to the navigable waters of the country, or, even if prevailing for a time, has given way, or been greatly modified, under the different conditions there."

Again in 137 U. S., p. 669, it is said:

"As an incident of such ownership the right of the riparian owner, *where the waters are above the influence of the tide*, will be limited according to the law of the state either to low or high water mark or will extend to the middle of the stream."

In Bullock vs. Wilson, 2 Port., 445, the court said:

"There has been much litigation whether the right extends to the high, or low, or the ordinary water mark, or to the centre (often called the thread) of the river. Our chief concern at present, is with a navigable river, *where the tide does not ebb and flow*."

To the case of Jennings, ex parte, (6 Cowen, p. 544) the reporter has appended a note, in which are collated most of the

authorities on this subject. A brief notice of this, instead of the original cases, will suffice on the present occasion. It is there said to be settled by the Common Law, "that where a man's land *abuts* upon or *adjoins* to any river above tide water, he owns the river to the centre of the stream."

In Wright vs. Seymour, 69 Cal., 126-7, (10, Pac. 323) after asserting the proposition that at common law all streams wherein there was no flow and reflow of the tide were in navigable streams, and that the riparian owners owned to the thread thereof and the difference in circumstances between England, where that rule originated, and this country, the Supreme Court of California said:

"The doctrine of the common law in reference to the rights of riparian proprietors upon streams which are navigable in fact, though not subject to the flow and reflow of the tide, has been modified in some respects in many states of the Union. In Pennsylvania, Alabama, Tennessee, and some other states the doctrine is held that in all streams navigable in fact, the riparian proprietor only takes to low water mark, the soli and water formed between the lines that described low water mark being retained as eminent domain for the use of all citizens and that the right of navigation in all such navigable waters is the paramount public right of every citizen. (Flanigan vs. Philadelphia, 42 Pa. St., 219; M. B. Co. vs. Kirk, 46 Pa. St., 112; Bullock vs. Wilson, 2 Port. Ala., 436, Elder vs. Burrus, 6 Hump., 356-358.)

"We fail, however, to find in any of the United States an adjudged case in which it has been held that a conveyance of land bordering upon a *tidal stream*, in the absence of an express intention so to do, has been construed to pass title to any land *below high-water mark;* and the doctrine of sections 830 and 670 of our Civil Code is believed to be but a declaration of the law on this subject, as it has existed since the formation of our state government."

Section 830 is in the following language:

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream at

low water mark; when it borders upon any other water the owner takes to the middle of the lake or stream."

Section 670, *supra*, is as follows:

"The state is the owner of all land below tide water, and below ordinary high water mark, bordering upon tide water within the state, of all land below the water of a navigable lake or stream, etc."

Wright vs. Seymour, 69 Cal., 126-7.

The above shows the policy of the law to restrict and not to enlarge the riparian ownership at the expense of the state.

It is not, therefore, surprising to find that in Webb vs. Demopolis and in every other case in Alabama where it has ever been held that the riparian owner took below high water mark, the land in question was situate far above the influence of the tide, and was upon a stream of such a nature that at common law the riparian owner took to the middle of the stream, and that his common law right was by the decision restricted and not extended.

Following the common law all of the authorities, except in states controlled by statutes, agree that the riparian ownership on *tide* waters extends only to high water mark.

Alabama—Mobile vs. Eslava, 9 Port., 577.
" Goodtitle vs. Kibbe, 1 Ala., 403.
" Kennedy vs. Beebe, 8 Ala., 914.
" Pollard vs. Greet, 8 Ala., 941.
" Mobile vs. Mobile Trans. Co., M.S.

(California)—People vs. Morrill, 26 Cal., 357.
" More vs. Massini, 37 Cal., 432.
" Wright vs. Seymour, 69 Cal., 122. (10 Pac., 323).
" Long Beach Land & Water Co. vs. Richardson, 70 Cal., 209. (11 Pac., 695).
" Kimball vs. McPherson, 46 Cal., 108.

(Connecticut)—East Haven vs. Hemingway, 7 Conn., 202.
" Simons vs. Freach, 25 Conn., 352.
" Middletown vs. Sage, 8 Conn., 221, 228.
" Chapman vs. Kimball, 9 Conn., 40-1.
" State vs. Sargent, 45 Conn., 373.

(Florida)—Sullivan vs. Moreno, 19 Fla., 219.
" Rivas vs. Solary, 18 Fla., 126.

(Maryland)—Day vs. Day, 22 Md., 537.
" Garritee vs. M. & C. C. of Balto., 53 Md., 432.
(Mississippi)—Martin vs. O'Brien, 34 Miss., 22.
(New Jersey)—Gough vs. Bell, 1 Zab., 157.
" Bell vs. Gough, 3 Zab., 624.
" State vs. Jersey City, 1 Dutch, 525.
" Stevens vs. P. & N. R. R. Co., 5 Vroom, 532.
(New York)—Wheeler vs. Spinola, 54 N. Y., 385.
" Trustees vs. Kirk, 68 N. Y., 460.
" Gould vs. H. R. R. Co., 6 N. Y., 522.
" People vs. Tibbetts, 19 N. Y., 523.
" Roberts vs. Baumgarten, 110 N. Y., 380. (18 N. E., 96)
(Oregon)—Bowlby vs. Shively, 22 Oregon, 410. (30 Pac., 154).
" Parker vs. Taylor, 7 Oregon, 445.
(Rhode Island)—Bailey vs. Burges, 11 R. I., 331.
" Aborn vs. Smith, 12 R. I., 373.
" Brown vs. Goddard, 13 R. I., 76.
(Texas)—Mayor of Galveston vs. Menard, 23 Tex., 349.
(Washington)—Eisenback vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, id., 531. (27 Pac., 550).
" Morse vs. O'Connell, 7 Wash., 117. (34 Pac., 426).
" Allen vs. Forrest, 8 Wash. & 702. (36 Pac., 971).

There is a dictum to the contrary, in the case of Peck vs. Lockwood, 5 Day, 22 (Conn.), but that was subsequently repudiated in the case of Chapman vs. Kimball, 9 Conn., 40.

The cases in Maine, Massachusetts and New Hampshire are not exceptions to the rule, since the colonial ordinance of 1641, which was in effect a statute, expressly extended the right of riparian proprietor in the soil from high to low water mark.

(Maine)—Parker vs. Cutler Milldam Co., 20 Me., 357.
" Babson vs. Tainter, 10 Atlantic Rep., 63.
(Massachusetts)—Mayhew vs. Norton, 17 Pick., 359.
" Green vs. Chelsea, 24 Pick., 77.
" Salstonstall vs. Proprietors, 7 Cushing, 195.
" Boston vs. Richardson, 105 Mass., 354.

(New Hampshire)—Clements vs. Burns, 43 N. H., 609, 621.
" Nudd vs. Hobbs, 17 N. H., 524.

We can say with the Supreme Court of California:

"We fail, however, to find in any of the United States an adjudged case in which it has been held that a conveyance of land bordering upon a tidal stream, in the absence of an expressed intention so to do, has been construed to pass title to any land below high-water mark."

Wright vs. Seymour, 69 Cal., 126 7. (10 Pac., 323.)

The writer of this brief is far from any desire to dispute the correctness of that policy which is announced in Webb vs. Demopolis, and which restricts common law right of the riparian owner upon navigable rivers above the tide; indeed he can see no just reason for permitting him to occupy below the high-water mark; it seems to us that there is no real distinction between a navigable stream where the tide ebbs and flows and a navigable stream where the tide does not ebb and flow; the distinction was adopted in England because it was regarded as a reliable test of navigability, and it should be wholly discarded in America where it is known to furnish no test whatever. Far from complaining that our court has abandoned the test in part, I am quite sure that the logical solution of the question is to abandon the distinction *in toto* since it is entirely inapplicable to our surroundings. The distinction has been wholly abandoned in many states, and in every instance where it has been wholly discarded, the riparian owner has been restricted to high-water where the stream was navigable, and in no single instance has his title ever been extended where the tide ebbs and flows.

McManus vs. Carmichael, 3 Iowa, 1.
People vs. Canal Co., 33 N. Y., 466-7.

The abandonment of an erroneous rule—one founded upon the topography of England and utterly inapplicable to America—should be entire and not partial.

To restrict the owner to high-water mark wherever the

river is actually navigable is the logical rule and that which is approved by the Supreme Court of the United States.

Barney vs. Keokuk, 94 U. S., 324.
Packer vs. Bird, 137 U. S., 671.

And by nearly all of the states which have departed at all from the old common law rule.

It may be, however, that in Alabama the wholesome and much neglected rule of *stare decisis* forbids the overruling of Webb vs. Demopolis and the cases therein cited. Nothing, however, could justify the extension of the low-water mark rule to tidal waters. Such an extension would be without authority; in the teeth of an overwhelming and universal line of decisions both in England and in America.

But there are other grounds upon which we may reconcile Mobile vs. Eslava, 9 Port., 603.

Goodtitle vs. Kibbe, 1 Ala., 403.
Pollard vs. Greit, 8 Ala., 940.
Kenedy vs. Bebee, 8 Ala., 914.

and the many cases in the Supreme Court of the United States with the cases of Webb vs. Demopolis and those upon which it rests, and upon which we may justly claim that these later decisions do not affect the case at bar.

We shall undertake to show that neither in Webb vs. Demopolis, nor any other case, has the Supreme Court of Alabama ever questioned the doctrine of the City of Mobile vs. Eslava, and the other cases supra, but that this doctrine stands to-day as the unquestioned law of this state. This we shall do by referring to each of the cases in this state, leading up to the case of Webb vs. Demopolis, none of which has the slightest application to the case in hand.

It is decided in the case of Webb vs. Demopolis, in the 95th Alabama, page 129, in which, however, the land was above the ebb and flow of the tide, and which cannot therefore affect the question whereas in the case at bar the land is below tide waters, that "whether the grant made by the United States to George S. Gaines for the Demopolis Town Company, and

which enured to its benefit, of the land upon which the city of Demopolis now stands, extended to ordinary high-water mark, or to the line of the low-water, or to the middle thread of the Tombigbee River, depends, therefore upon the rule of property in this respect, which Alabama has adopted. The rule which this state has adopted and declared through this court is, that a grant by the United States to land bordering on a navigable river includes the shore or bank of such river, and extends to the water line thereof at low-water."

Had the grant by the United States government to George Gaines been issued prior to the admission of the State of Alabama into the Union, this case would assert that some title passed *from the State to the grantee of the United States Government*, and not from the United States Government to its grantee. A title, like any other thing, or right, can, of course, pass only from the place from which it then is. The title was in the state, and if it passed to any other person, it had, of course to pass from the state, and from no other source. Had the grant in this case, therefore, been made subsequent to the admission of Alabama into the Union, and were the lands in question within the influence of the tide waters, it would be necessary for us to go further, and inquire how that title passed from the state into the grantee of the government, and what was the nature of the title which did pass; whether a title or an easement, whether revocable or irrevocable, and whether the circumstances of the present case are such as to have carried this title from the state; also as to when this title is supposed to have passed, and whether, at this time, it was in the state, or in some other person; and if in some other person, then whether or not the same circumstances which operated to divest the state of its title, would operate to divest the grantees of the state of their title.

It seems to us, however, to be clear, that since the grant which was construed in the case of Webb vs. Demopolis, was a grant by the United States government before the admission

of the state into the Union, this case has no application whatever. There the title to the land in question had never been conveyed to the state. The question therefore as to how far the title extended was only a question of construction, or of intent. The grantor in the instrument to be construed in those cases, held at the time of the grant, the title to the land not only down to the high water mark, but also to low water mark. The question in the present case is a question of the power of the United States government to grant what it did not possess. The question in the case of Webb vs. Demopolis, and in all other cases where the grant was made at the time that the government making the grant, owned the land down to low water mark, and beyond, was a simple question as to the construction of the grant, or, in other words, as to the intention of the grantor in describing the lands. The rule, therefore, laid down in Webb vs. Demopolis, was only a question as to the intention of the United States Government, or the construction of its patent. The question as to the effect of the grant by the United States Government, conceded to describe the lands as far as the low water mark, but made at a time when the government possessed no title below high water mark, was not presented in the case of Webb vs. Demopolis, and ought not to have been, and was not decided in that case. On the contrary, in the case of the City of Mobile vs. Eslava, 9 Porter, 603, and in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and in the case of Pollard vs. Greit, 8 Ala., 940, and in the case of Kennedy vs. Bebee, 8 Ala., 914, and in the several decisions of the Supreme Court of the United States, the question was, as it is here, not as to what land was described in the patent, but as to what effect was to be given to a patent issued by the United States Government to land which it had already conveyed to the State of Alabama, and to which it therefore possessed no title. In all of these decisions it was expressly decided, that where the United States Government had parted with its title to the land to the State of Alabama, by admission

of the State into the Union, as it did with all shores of navigable streams, not already disposed of, a subsequent patent by the United States Government was wholly void, and passed no title, that is to say, it neither passed the title from the United States Government nor operated to pass the title out of the State, and in each of these cases it was distinctly held that the patentee of the United States Government could not maintain ejectment for the possession of the property.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.

What we have said seems to us to demonstrate that the case of Webb vs. Demopolis, 95 Ala., 126-7, is in nowise in conflict with the doctrine formerly established in this State in Mobile vs. Eslava, 9 Port, 577.

The only cases cited by Webb vs. Demopolis, in the 95th Alabama, were those of

Williams vs. Glover, 66 Ala., 189.
City of Demopolis vs. Webb, 87 Ala., 670.
Doe vs. James, 11 Ala., 63.

None of these cases cite any Alabama cases, with the exception of the case of

Howard vs. Ingersoll, 17 Ala., 790.
Bullock vs. Wilson, 2 Porter, 436.
Mayor of Mobile vs. Eslava, 9 Porter, 577.

Demopolis vs. Webb, 87 Ala., 670, is the same case as Webb vs. Demopolis in the 95th Ala., and this case, therefore, needs no further discussion.

In the case of Williams vs. Glover, it is tersely said "The ownership of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low water marks." This again was a case where the land in question was upon a navigable river, but above the ebb and flow of the tide. That this authority did not intend to overrule the case of Mobile vs. Eslava in the 9th Porter, is evidenced by the fact that it cites that very case as the authority for the assertion just made. Williams vs. Glover was an action

by a landlord against a tenant for rent. The tenant could not, of course, dispute the title of his landlord to the land described in the lease. He had the right, and the simple right, to raise the question as to the proper construction of the terms of the lease, and whatever the lease described, the landlord was supposed to own, provided, of course, it was susceptible of private ownership. The report does not show upon what title the landlord relied. This title may have been derived from the State, and not from the United States Government at all, or it may have been derived from the United States before the admission of the State into the Union. The question which is now before the court was not in the slightest involved in the case of Williams vs. Glover, and it was not discussed or considered. It is, at most, a dictum that a grant made by the government which owns the land and which bounds the grant by the river, above tide waters, would be construed to intend to convey to the low water mark.

The case of Howard vs. Ingersoll, in 17 Ala, 790, is a case where the construction of a grant to an individual was under consideration. That case involved simply the construction of a treaty, and it was there held that where the dividing line between two states was established as the river line on one side, the line referred to must be supposed to be low water mark. But the ground of this decision is simply a question of convenience in political divisions of government, it being apparent that it would be dangerous, as well as inconvenient, if the jurisdiction of one state should extend across the river up to the high water mark on the other side, while the jurisdiction of the other state extended only as far as high water mark on its own side of the river. If such a construction were given to the treaty, it would of course, create the ownership in one state of a narrow strip of land lying across the river from any other portion of its territory, which would be of such a character that it could not be inhabited, and therefore impossible to police, a result which would, of course, be ruinous. The ques-

tion as to the effect of the grant by the United States Government of land bounded by a river, or other navigable stream, subsequent to the time when the United States Government had ceased to have any title to the land below high water mark, was not, to any degree, involved in that case, and indeed, it was not even material in that case as to what would have been the proper rule of construction of the individual grant bounded by a river, made by a government while owning the land to the centre of the river. Indeed, in that very case, Chief Justice Dargan said that he did not think it necessary to examine the numerous decisions with which our books abound, and to many of which they had been referred, for the reason that they had reference to the rights of individual owners. *But, however this may be, the river which was in question in Howard vs. Ingersoll, 17 Ala., 790, was not a navigable stream, and on pages 791 and 792, the chief justice expressly distinguished between the cases which he was considering, and the cases where the land was bounded by navigable water where the tide ebbs and flows.*

The case of Kennedy vs. Jones, in 11 Ala., 63, does however, relate to a part of the water front in the city of Mobile, but does not in any manner affect the question under discussion. This decision was rendered by Chief Justice Collier, the same judge who rendered the dscision in Eslava vs. City of Mobile, and the subsequent case of Pollard vs. Greit, in 8 Ala., and it would have been queer had he intended to assert anything in conflict with these cases after they had been approved by the Supreme Court of the United States, and without in any manner referring to them, and it is not surprising, therefore, to find that there is nothing whatever in the case of Kennedy vs. Jones, intimating in the slightest degree that the grantee of the United States Government under a patent issued subsequent to the admission of the State into the Union, took anything below high-water mark. In this case of Kennedy vs. Jones, on the contrary, see pages 84, 85 and 86, it was held

that the grant to the soil below high-water mark, had been made by the Spanish Government long before the admission treaty under which the United States Government obtained title to the property in question, and that transfer of the possession of Mobile and the adjacent country from Spain to the United States in 1813, did not interfere with the title below high-water mark, *which had been already expressly granted to the City of Mobile by the Spanish Government.*

The only other case cited, is the case of Bullock vs. Wilson, 2 Porter, 445. In this case, it was distinctly held that the grantee of the United States Government did not take beyond low-water mark but whether he took between high-water mark and low-water mark was not presented by the facts in the case. The holding in that case was simply to the effect that the riparian owner could not claim below low-water mark, and the court does not discuss the question as to whether he could go to that extent, or not, that being entirely irrelevant to the case. *In addition to this, this case was not a case of tide water, but the property in question was bounded by the Coosa river.*

These are the only cases decided by the Supreme Court of Alabama, which are relevant to the question in hand, so far as we have been able to discover. A careful reading of these cases will demonstrate that every time that the question now urged upon the court, that is to say, the question as to the effect of the grant by the United States upon land *bounded by tide water,* made by the United States Government, subsequent to the admission of the State of Alabama into the union (including several distinct submissions), the Supreme Court has emphatically declared that the title of the patentee of the United States Government extended only to high-water mark.

There is, thefore, no conflict whatever in the decisions of the Supreme Court of Alabama.

In challenging the production of a case where it had ever been held that the shore of tide waters passed by a patent from the United States Government, issued subsequent to the ad-

mission of the State, we were aware that in several States the riparian owner, even upon tide waters, has been permitted by statute and even by acquiescence, to wharf out to navigable water. This privilege, wherever recognized, however, has been obtained directly from the State, it is not a title, but a license: it is not a right against the State or its assignee, but merely a privilege, supposed to be indulged by the State in the absence of an expression of a contrary intent.

This doctrine of an implied license to wharf cannot, we think, have any application in Alabama, where it is provided by section 25 of the Declaration of Rights, that "No tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same is *expressly* authorized by law."

The doctrine where it prevails, however, is to the effect that in the absence of the expression of the contrary intention on the part of the State, acting through those who are authorized to act in this matter, it will be assumed by the court that the State intends to permit the owner of the adjoining land to use the land between low-water and high-water mark, which is adjacent to its other property. The Supreme Court of Alabama, of course, has no power to create any license, but this license must come from the State, and not from the court. The cases of Stephens vs. P. & N. R. R. Co., 34 N. J., L 546, and of Pa. R. R. Co. vs. N. Y. & L. B. R. R. Co. 23 N. J., E. 159, are directly in point, and it was there held, after an exhaustive argument of the matter, that the court will presume an intention on the part of the State to grant a license to the owner of adjoining lands, to use the shore, *though this license is, at all times, revocable before the acceptance thereof.* The same idea seems to be suggested in the language already quoted from Webb vs. Demopolis where it is said, "this doctrine proceeds on the theory that inasmuch as the State owns in its sovereign ca-

pacity the soil under the waters of navigable streams, it is within the State's competency to determine to what extent its prerogatives to lands so submerged shall be exercised, and to what extent such prerogative shall be abated, or not asserted and exercised, in the sense of admitting individual proprietorship in such lands."

In the case at bar, there was no acceptance of the license in question, prior to the act of 1867, by which this license was expressly withdrawn, or, rather, the proprietorship of the State was expressly asserted and exercised by a State "in a sense admitting individual proprietorship in the city of Mobile.' The most extreme construction which could be placed upon the language of Webb vs. Demopolis, will not authorize the supposition that the State could not by statute, before the exercise of any right over these lands, assert and exercise its prerogative by admitting individual proprietorship and conveying the land, to a distinct individual, and thereby cutting off the supposed license. If it be suggested that the grant by the United States was made in 1836, while the grant by the State of Alabama to the city of Mobile, was made in 1866, and that, therefore, about thirty years had elapsed during which the license was in force, it is sufficient to say that while it may have been true that during that time the patentee did have power to avail himself of this license, he did not do so, and that it was revocable until it was exercised, or, rather, that there is nothing from which to imply the license until it is exercised.

My theory in regard to the nature of the right which the grantee of the government obtains to the lands below high water mark in those states where this rule prevails, is supported by the case of Shively vs. Bowlby, 152 U. S., 55, where it is said, "Upon a review of its prior decisions, the court was of opinion that by the law of Oregon, in accordance with the law as formerly held in New York in Gould vs. Hudson River Railroad, 6 N. Y., 522; with the law of New Jersey, as declared

in Stevens vs. Paterson & Newark Railroad 5 Vroom (34 N. J. Law) 532, and recognized in Hoboken vs. Pennsylvania Railroad, 124 U. S., 656; and with the law of the state of Washington, on the other side of the Columbia River, as declared in Eisenback vs. Hatfield, 2 Wash. St., 236; and upon the principles affirmed in decisions of this court, above cited, and especially in Hardin vs. Jordan, 140 U. S., 371-382; the authority conferred by the statutes of Oregon upon upland owners on navigable rivers to construct wharves in front of their land did not vest any right until exercised, *but was a mere license revocable at the pleasure of the legislature until acted upon: and that the State had the right to dispose of its tide lands free from any easement of the upland owner.*" See 22 Oregon, 420.

Speaking of this matter on page 51, Shively vs. Bowlby, Supra, the court said:

"It is evident, therefore, that a donation claim under this act, bounded by the Colombia River, where the tide ebbs and flows, did not, of its own force, have the effect of passing any title in lands below high water mark. Nor is any such effect attributed to it by the law of the State of Oregon." On page 58 it is said:

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

In the case of Barney vs. Keokuk, 94 U. S., 324-338, which was quoted with approval in Shively vs. Bowlby, 152 U. S., 44, and also by our Supreme Court in the case of Webb vs. Demopolis, it was said: "Whether, as rules of property, it would now be safe to change these doctrines where they have been applied as before remarked, is for the several states

themselves to determine. If they choose to resign to the riparian proprietor rights, which properly belong to them in their sovereign capacity, it is not for others to raise objections." From these quotations, as well as from the admitted fact that the title was in the state, and not in the United States, to the lands beneath low water mark, after the admission of the state into the Union, it must necessarily follow that whatever title to these lands was obtained subsequent to the admission of the state into the Union, was obtained from the state and not from the United States. It is quite clear that the title could not possibly have come from the state without either an act of legislature, or a deed, or a patent. The Supreme Court could, of course, decide what the state had granted, but it could not, itself, make a grant. All that the court could do, would be to construe the acts of the state. It seems to us, therefore, to follow, that there never has been any legislation conferring upon the riparian owners any title to the lands below high water mark; the right which he takes from the state, if he takes any, is a license and not a title, and being a license is revocable at any time before exercise, and in this case any such license would have been revoked by the act of legislature conferring the title upon the City of Mobile.

Probably no better considered case will be found than that of Stevens vs. The P. & N. R. R., 34 N. J. L., 544 6, where after an elaborate review of the authorities, the positions taken by us were fully vindicated and it was thoroughly established that the right to wharf out was mere license, at all times revocable by the State. It is there said;

"From these authorities and many others which might be cited, it appears to me to be plain, that by the rules of the ancient law, the owner of land along the shore was entitled to no right as an incident of such township, except the contingent ones before referred to of alluvion and dereliction; and that, on the other hand, the title to the soil under tide water was in the sovereign: and that such title was attended with the usual

concomitants of the ownership of reality. And it consequently follows from this result, that in order to enable the owner of the upland to fill in or wharf out below the line of high water, it was absolutely necessary to adopt some principle different from those of the common law. And this, as I understand, was the foundation on which the majority in this court placed themselves in the decision of the case of Gough vs. Bell. That final decision was a concurance in the view expressed by Chief Justice Green, in his opinion delivered in the Supreme Court; and that view was, as I apprehend, the only one which could invest the claim of the land owner to extend his lands by artificial means below the line of high water with the faintest semblance of legality. As such claim could not rest on the common law, it was indispensable to invoke and sanction a custom or local usage variant from the common law. How far such a custom, as a mode of acquiring a title to real estate, can be made to harmonize with legal principles, it is not necessary to inquire, for as before remarked, I consider the existence and legality of such a usage to be res adjudicata in this State. Admitting its legal existence, then, the inquiry presses as to its effect in law. It confers a right, by the legal exercise of which the bank owner may encroach on the public property between high and low water marks. If such a right existed by force of the common law, as an incident of property, it is obvious it could not be destroyed or substantially impaired by the legislative power, without compensation. The question is, whether this customary right has the same quality and efficiency as though it appertained to the land by force of the common law.

"My consideration of this branch of the subject has led to the conviction that such privilege has not the effect suggested in the above inquiry. The local custom in question was nothing more than a license on the part of the public to the land owner, enabling the latter to fill in or wharf out along the fore shore between high and low water marks, and which license, when executed, became irrevocable. The shore owner

acquired his indefeasible right by the acquiescence of the public in the performance of the act. That this was the view of the judges whose opinions prevailed in the decision of Gough vs. Bell is, I think, clearly manifest. I have above observed that the true doctrine with respect to this local custom is embodied in the opinion read in the Supreme Court by Chief Justice Green. In that opinion, this clear statement with respect to the necessity of the execution of the license, as a pre-requisite to the acquisition of a legal right on the part of the land owner is to be found, viz: 'In New Jersey, as we have seen, the title of the state extends, as at common law, to high water mark as it actually exists. Where the waters have receded by alluvion or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high water line. That every encroachment upon the shore or other part of the public domain may, at all times, be restricted or controlled by the legislature, is admitted. That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied. But in the absence of such legislative restriction, where no nuisance is created, the riparian proprietor may appropriate the shore between high and low water mark to his own use.' This language is too clear and explicit to need explanatory comment. That the local custom of the state which was recognized and enforced by the court, operated as a simple license to the riparian owner to enlarge his possessions at the expense of the public domain, and which license was revocable at any time before execution, is the clear doctrine of the adjudication in question: It has no reach beyond this. And from that time to the present, I do not perceive that the judiciary of this state have been in any doubt upon this subject."

Indeed, the state may grant to any individual the right to wharf out upon the shores of another's land without compensation to latter. This is no violation of the riparian owner's rights.

(Mississippi)—Martin vs. O'Brien, 34 Miss., 22.
(West Virginia)—Ravenswood vs. Fleming, 22 W. Va., 52.
(Washington)—Eisenback vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, 2 Wash., 531. (27 Pac., 550).

The right to wharf out rests upon passive or implied license merely. The state may regulate it, or even prohibit it.

(Wisconsin)—Cohn vs. Wausaw Boom Co., 42 Wis., 302.
" Diedrich vs. R. R. Co., 42 Wis., 262.

(Washington)—Eisenbach vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, 2 Wash., 531. (27 Pac., 550).

(Connecticut)—State vs. Sargent, 45 Conn., 358.
(Iowa)—Musser vs. Hershey, 47 Iowa, 361-2.
(New Jersey)—Stevens vs. P. & N. R. R., 5 Vroom, (N. J.) 532.
" Keyport, &c., Co. vs. Farmer's Transp. Co., 3 C. E. Green, (N. J.) 511.

In the case of Shively vs. Bowlby, the title of the grantee of the State was upheld. 152 U. S., 1.

We have devoted great labor to the investigation of this question, and we have not seen a single case in which the right of a patentee from the United States Government to the land below high-water mark, where the patent was issued subsequent to the admission of the State into the union, was ever upheld as against the State or its assignee. Even in streams above tide water the riparian owner has been allowed to hold—when at all—only upon the presumption of a grant or license by the State and never against the will of the State.

In this case the objection is made by the State itself, or its grantee, there having been an express revocation of any license that might otherwise have been implied by an express grant by the State to the city prior to the exercise of any right, or supposed right, on the part of the patentee.

But the Grant under which the Plaintiff in Error claims was by fixed boundaries and did not follow.

It ought, however, to be observed that under the particular grant under which the plaintiff in error claims, the grantees never took to the water's edge, but that their boundaries were fixed by metes and bounds, and it seems to be thoroughly settled that where the land has fixed bounds and metes other than the water's edge, it carries with it no right to the shore below the boundary, or to accretions, or other riparian rights. This is because it is altogether a matter as to whether the grantor owns the riparian rights, and intends to convey them. In the case of Hoboken vs. Pa. R. R. Co., 124 U. S , 690, it was said by the Supreme Court of the United States that the right of accretions passes to the adjoining owner only because it is within the description of the grant, and where the description is by metes and bounds, they control.

City of Mobile vs. Eslava, 8 Porter, 577.
Ellinger vs. Mo. Pac. Rwy., 20 S. W., 800.
Pollard vs. Files, 2 How., 707.
Mayor & Aldermen vs. Eslava, 9 Porter, 577
Fulton vs. Frendolig, 63 Texas, 330.
James vs. Howell, 41 Ohio State, 693.
Cook vs. McClure, 58 N. Y., 437.
Sweringen vs. St. L., 52 S. W., 348.
Dunlap vs. Stetson, Fed. Cas., 4164.
1 Amer. & Eng Enc. of Law, 473 note. (2nd Ed)
Hoboken vs. Penn. R. R., 124 U. S., 690.

The power of the State of Alabama to grant these lands to the City of Mobile. No Interference with Commerce.

The plaintiff in error has, we think, suffered himself to confuse the idea of practical interference with navigation and the consequent interference with interstate commerce with the idea of the power of the State owning the shore of the naviga-

ble stream to transfer its title to a municipal corporation or private individual. With a supervision of the former question in streams that are navigable for interstate commerce, the federal courts are vested with jurisdiction by that provision of the federal constitution which confers upon Congress the power to regulate commerce between the States, but there is no provision in the federal constitution whatsoever, which vests the federal court with authority to review the opinion of the State courts in regard to any disposition of the shores, or the soil under the navigable stream within the State, which does not operate as a practical and actual interfereence with navigation.

A State may in fact authorize even an obstruction to commerce, in the absence of any exercise of congressional authority.

Leovy vs. United States, 177 U. S., 629.
Wilson vs. Blackbird Creek, 2 Peters, 245.
Withers vs. Buckley, 20 How., 84.
Cardwell vs. American Bridge Co., 113 U. S., 205.
Williamette Bridge Co. vs. Hatch, 125 U. S., 1.
Shively vs. Bowlby, 152 U. S., 133.

And indeed, Congress has never undertaken to exercise any authority over navigable streams above the established channel line.

Leovy vs. United States, 177 U. S., 629; see also
The act of March 3, 1899, 53rd Congressional session, third chapter, 435, sections 9 and 10, page 1151.

It is to be observed as to what is pointed out in the case of Levy vs. U. S., 629, that the control of the federal court over navigation does not arise out of any constitutional provision relating thereto, and does seem itself, therefore, to relate to the title to the land or the possession thereof, but refers only to the matter of regulating commerce between the foreign nations and between the states and extends only to those things which interfere therewith. It does not relate to the uses of the shore which are not inconsistent with such navi-

gation or commerce. This is altogether a question for the state authority.

Water Power Co. vs. Water Commissioners, 168 U.S., 358.
Packer vs. Bird, 137 U. S., 661.
St. Louis vs. Rutz, 138 U. S., 226.
Kaukauna Water Power Co. vs. Green Bay Co., 142 U. S., 254.

The case of the I. C. R. R. Co. vs. Ill., 146 U. S. 387, is relied upon by the appellant to establish the proposition that it was not competent for the Legislature of the State of Alabama to convey to the city of Mobile the lands in question. That case when closely examined, however, is very far from so holding. It may be conceded it is true, that the effect of the case is to limit a grant of this kind in character to a license, revocable by the State, in so far as it extends beyond the point of practical navigability of the stream. It is, however, expressly held in that case that a grant by the State even to a private individual, would be entirely valid down to the line where the stream is practically navigable, and that beyond this, even the bed of the lake could be granted to a private corporation, although this grant would remain revocable at the election of the State. In that case, on page 435, it is said:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations and among the States. *This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.*"

There is absolutely nothing in this case to justify the belief that the state could not grant to the city the land to the channel line in absolute fee simple, or even grant to the City of Mobile, the land below this line, although this portion of the grant might be revocable.

It will be observed, as was pointed out in the opinion of the Supreme Court of Alabama, that far from constituting a hindrance to navigation or commerce, the grant to the City of Mobile had for its very object the furtherance thereof; that it was in performance and preservation of the public trust that the grant was made.

Indeed, to hold that a wharf could not be owned either by the city, or by private owners would be ruinous to the commerce of the State of Alabama. The State of Alabama has never erected any wharves of its own, and such a holding would prevent their erection in the future by municipalities or private persons or corporations and thereby render Alabama's only port entirely unavailable.

The right of disposition of land by the state to the channel of the river seems to be settled in Shiveley vs. Bowlby, 152 U. S., 46-7.

C. J. Taney in Goodtitle vs. Kibbe, 9 How., 478, speaking of the power of the government to convey this very shore said:

"Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant *before Alabama became a State.* But this was not done."

"If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin vs. Waddell, 16 Pet., 367; Pollard vs. Hagan, 3 How., 212; and Goodtitle vs. Kibbe, 9 How., 471. These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters."

The paragraph last above we have quoted from Packer vs. Bird, 137 U. S., 671, where it is quoted from Barney vs. Keokuk, 94 U. S., 324.

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated; if a State has been organized and established there. * * * * The State may even dispose of the ursufruct of such lands, as is frequently done by

DARK PAGE BLEED THRU

leasing oyster beds in them and granting fisheries in particular localities; also *by the reclamation of submerged flats,* and the erection of wharves and piers and other adventitious aids of commerce. Sometimes, large arears so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce."

Hardin vs. Jordan, 140 U. S., 381-2.

The Supreme Court of the United States, in Hoboken vs. Penn., R. R. Co., 124 U. S., 690, after quoting with approval from Stevens vs. P. & N. R. R., 34 N. J. Law, 532, summed up the quotation thus:

"It was therefore, held in that case that it was competent for the legislative power of the state to grant to a stranger lands constituting the shore of a navigable river under tide water below the high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water and that without compensation to him for the loss."

See State vs. Jersey City, 25 N. J. L., 525.
People vs. Canal Co., 33 N. Y., 466-7.

The state may grant a right of way to a railroad to construct its road between low and high water marks, and the fact that this interferes with the riparian owner's access to the water does not give him a right of action. His right to use the waters is his, as a member of the community, and not as riparian proprietor, and this community is subject to sacrifice by legislative act for the public good.

Gould vs. Hudson River R. R. Co., 6 N. Y., 522.

The state has power to make an absolute grant of the title to submerged lands to the city or to any third person.

Knight vs. U. S. Land Co., 142 U S., 183.

Lowndes vs. Huntington, 153 U. S., 59.

(Alabama.)—Hagan vs. Campbell & Cleveland, 8 Port., 25.

City of Mobile vs. Eslava, 9 Port, (Ala.) 578, S. C., 16 Pet., U. S., 251.

(California.)—Eldridge vs. Cowell, 4 Cal., 87.
" Ward vs. Mulford, 32 Cal., 366.
" Chapin vs. Bourne, 8 Cal., 295-6.
" Dana vs. Jackson-street Wharf Co., 3 Cal., 138, S. C. 89, Am. Desc. 164.

(Connecticut.)—East Haven vs. Hemingvay, 7 Conn., 198.
" Simmons vs. French, 25 Conn., 346.

(New Jersey.)—Gough vs. Bell, 1 Zab., 157.
" State vs. Jersey City, 1 Dutch, 525.
" State vs. Brown, 3 Dutch, 14.
" State vs. Collector, 4 Zab., 108.
" Keyport & C. Co. vs. Farmers' Tranp. Co., 3 C. E., Gr., 511.

(New York.)—Gould vs. H. R. R. Co., 6 N. Y., 522.
" People vs. Tibbetts, 19 N. Y., 528.
" Williams vs. Mayor, 105 N. Y., 420. (11 N. E. 829.)

(Ohio.)—Blanchwood vs. Porter, 11 Ohio, 138.

(Texas.)—Mayor of Galveston vs. Menard, 23 Tex., 349.

(Virginia.)—McCready vs. Commonwealth, 27 Grattan, 985.

(Washington.)—Eisenbach vs. Hatfield, 2 Wash., 236. (S. C., 26 Pac. R., 539.)
" Morse vs. O'Connell, 7 Wash., 119. (S. C., 34, Pac. R., 426.)
" State vs. Prosser, 27 Pac. R., 550.

(Wisconsin.)—Wisconsin R. I. Co. vs. Lyons, 30 Wis., 65.
" Cohn vs. Wausau Broom Co., 47 Wis., 34-35. (2 N., 546.)

(Mississippi.)—Martin vs. O'Brien, 34 Miss., 22.

From what we have said and from the authorities which we have cited, it seems to us to be clear, that it is competent for the state to convey to a city the title of the shore and bed of navigable rivers within its bounds, certainly where, as in this case, the grant is for the benefit of the public, although we do not think that the doctrine is limited to such cases. We think it also apparent that such a grant does not interfere with commerce, but is, as the Supreme Court has declared, in advancement of commerce. We believe that the contrary doctrine would strike down nearly every wharf in the navigable waters of the United States. Be this as it may,

THE PLAINTIFF IN ERROR IS NOT IN A POSITION TO RAISE THE QUESTION.

If the Supreme Court of the United States possesses any jurisdiction over this case, by reason of any objection to the state conveying the title to the shore on the Mobile River, to the City of Mobile, it must be because such a conveyance is unconstitutional as an interference with interstate commerce. We do not understand that the constitutional objection to a grant by a state can be raised by any person who happens to desire to defeat the title of the grantee.

In the first place, the constitutionality of an act of the legislature should never be passed upon until it becomes necessary to the decission of the cause.

Smith vs. Speed, 50 Ala., 276.
Jones vs. Black, 48 Ala., 540.
Joiner vs. Winston, 68 Ala., 129.

It is not necessary, in this cause, to consider the question as to whether this act of the legislature is constitutional or not. The defendant in the case claims title to the lands in question under a patent from the United States Government, which was issued subsequent to the time that the United States Government had parted with its title to the State of Alabama. It has no title, therefore, to the lands in question, whether the act of the legislature granting these lands to the City of Mobile is valid or void. If the act is valid, the city has the title; if the act is void, then the state still retains the title. In neither event has the defendant any title. The defendant's rights to the lands in question were not, therefore, affected in any manner by the grant to these lands from the state to the city, and it is thoroughly settled both in Alabama and elsewhere that the court will not "listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specifically affect. An act of the legislature will be assumed to be valid until some one complains, whose rights it invades; and it is only when some per-

son attempts to resist its operation and calls in the aid of the judicial power to pronounce it void *as to him, his property or his rights,* that the objection of constitutionality can be presented and sustained"

Jones vs. Black, 48 Ala., 540.
Shehane vs. Bailey, 110 Ala., 310.

In the case of Dejarnett vs. Haynes, 23 Miss., 603, which is cited with approval in Jones vs. Black, supra, the court said: "To entitle a party to insist upon the unconstitutionality of a law on the ground that it affects or impairs a right secured to him by the constitution, it must first be shown that he has the right. What right can be affected by the law in this case? We answer, only the title of Hubbard and Greene. Has the plaintiff shown that he has acquired either their title or possession under them? Certainly not. He has, therefore, failed to exhibit to the court any right which could be invaded by the legislature. No one but the party or person claiming under him, whose rights are affected by an act of the legislature, can plead its unconstitutionality."

In the case of St. Clair vs. Jackson, 8 Cowen Reports, 543, opinion pages 678-9, which was an action of ejectment, it is expressly decided that the defendant can not set up the unconstitutionality of an act of the legislature under which the plaintiff obtains his title from a third person. This opinion is directly in line, and is exceedingly interesting.

Speaking of this matter, in the case of Wellington et als, Petitioners, the Supreme Court of Massachusetts, 16 Pickering, 96, said: "Perhaps, however, it may well be doubted, whether a formal act of the legislature can ever with strict legal propriety be said to be void; it seems more consistent with the nature of the snbject, and the principles applicable to analagous cases to treat it as voidable. But whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and this injuriously affects

the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected. *Prima facie* and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attemps to resist its operation and calls in the aid of judicial powers, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained."

In the case of People vs. Brooklyn & Coney Island R. R. Co., 89 N. Y., page 73, opinion page 93, the same doctrine is asserted. See also People vs. Turner, 2 N. Y., Sup., page 253.

In the case of Jackson vs. Hudson, 3 Johnson Reports, 375, which was an action of ejectment, the court said: "The policy, or the abstract right of granting lands in the possession to the native *Indians*, without their previous consent as original lords of the soil is a political question with which we have, at present, nothing to do. It cannot arise or be discussed in a contest between two of our own citizens neither of whom deduce any title from the *Indians*. What would be the effect of an *Indian* possession or title in opposition to the grant under the patent, if they were to be brought into collision, is not a question before us."

THE OTHER QUESTIONS IN THE CASE ARE NOT FEDERAL.

All the other questions in the case relate only to whether the act of the Legislature of Alabama was valid under the constitution of the State of Alabama; whether the statute of limitations of Alabama was applicable to public property held by municipal corporations, and whether a city is estopped by the unauthorized acts of its Tax Collector; whether an estoppel can be pleaded in a common law court of ejectment. Over these questions the Supreme Court of the United States has no jurisdiction whatever, the decision of the State courts being final.

Respectfully submitted,

HARRY T. SMITH,

Attorney for Defendant in Error.